UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of Union Oil Company of California, a corporation	Docket No. 9305 PUBLIC VERSION

RESPONDENT UNION OIL COMPANY OF CALIFORNIA'S MOTION TO COMPEL AMENDED RESPONSES TO INTERROGATORIES

Pursuant to Section 3.38(a) of the Federal Trade Commission's Rules of Practice, Respondent Union Oil of California ("Unocal") respectfully moves for an order compelling Complaint Counsel to provide amended responses to Unocal's First and Second Sets of Interrogatories in light of the deposition testimony of the California Air Resources Board pursuant to Rule 3.33(c). The bases for this motion are set forth in the accompanying Memorandum in Support of Respondent Union Oil Company of California's Motion to Compel Amended Responses to Interrogatories. The statement required by Rule 3.22(f) is also attached to this motion.

Respectfully submitted,

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Dated: June 12, 2003

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of Union Oil Company of California, a corporation	Docket No. 9305

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT UNION OIL COMPANY OF CALIFORNIA'S MOTION TO COMPEL AMENDED RESPONSES TO INTERROGATORIES

I. INTRODUCTION

Pursuant to 16 C.F.R. § 3.38, Respondent Union Oil Company of California ("Unocal") respectfully seeks an Order compelling Complaint Counsel to provide amended responses to Unocal's First and Second Sets of Interrogatories. Unocal's interrogatories relate to the Complaint's core allegations that "but for" Unocal's failure to disclose its pending patent applications, the California Air Resources Board ("CARB") would have taken actions to adopt different regulations for reformulated gasoline, to limit Unocal's enforcement of its patent rights, or both. Compl. ¶¶ 5, 80. The interrogatories requested that Complaint Counsel identify the terms of alternative regulations that CARB would have adopted and describe how CARB would have limited Unocal's ability to enforce its intellectual property rights.

Complaint Counsel's responses to these interrogatories [REDACTED]

These theories, however, have now been repudiated by the deposition testimony of Mr. Peter D. Venturini, who was designated as

CARB's Rule 3.33(c) witness on these specific topics. In his testimony, Mr. Venturini emphasized that CARB would not have adopted any Phase 2 RFG regulations had it been aware of the Unocal patent application. As a result of this testimony, the interrogatory responses previously supplied by Complaint Counsel are now materially inaccurate. Pursuant to Rule 3.31(e)(2) of the Commission's regulations, these responses must be amended to be consistent with Mr. Venturini's testimony in his capacity as CARB's designated representative. Prompt amendment of the inaccurate responses will facilitate the narrowing of issues for trial and also spare Unocal the unnecessary burden of preparing defenses against alternative regulatory scenarios which are plainly no longer sustainable.

Pursuant to Section 3.22(f) of the Commission's Rules of Practice, counsel for Unocal have conferred with Complaint Counsel in a good-faith effort to resolve this issue prior to petitioning this Court for an Order.[1] Following Mr. Venturini's deposition, Unocal sent a six-page letter to Complaint Counsel in which it requested Complaint Counsel to submit amended interrogatory responses and explained in detail the reasons that the earlier responses were rendered materially incorrect by Mr. Venturini's testimony. Following an exchange of letters and a conference call to meet and confer on the issue, Complaint Counsel served Unocal with a one-paragraph document that purports to supplement the previous interrogatory responses by "incorporating by reference the deposition testimony of the California Air Resources Board pursuant to Rule 3.33(c), and the testimony of Peter D. Venturini, Chief of the Stationery Source Division of the California Air Resources Board." This response does absolutely nothing to

[1] *See* Statement Required by Rule 3.22(f) (Exhibit 1). Copies of all correspondence between Unocal and Complaint Counsel relating to this motion are included as Attachments to Exhibit 1.

correct the materially inaccurate statements included in Complaint Counsel's initial responses or to identify the "but-for world" alternative to which the Complaint refers. Instead, it constitutes an evasion of Complaint Counsel's duties under Rule 3.31(e)(2). As it has become clear that Unocal and Complaint Counsel have very different views of the obligations imposed by the Commission's rules, and because time is of the essence, Unocal seeks an Order compelling amended answers to the interrogatories that withdraw materially incorrect theories and statements.

II. ARGUMENT

A. Background

The Complaint alleges that Unocal defrauded CARB during the course of its Phase 2 RFG rulemaking by representing to CARB that certain Unocal research results were "nonproprietary" and that adoption of a predictive model in that government agency's regulations would be cost-effective and flexible, without disclosing that Unocal was seeking patent protection for inventions relating to reformulated gasoline. Compl. ¶ 2. The Complaint further alleges that had CARB been aware of the Unocal patent application, the Phase 2 RFG rulemaking would have had a different outcome: "CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both." Compl. ¶¶ 5, 80.

Putting aside whether Unocal had a duty to disclose its application or whether CARB actually relied on Unocal's statements, the Complaint's allegations that Unocal's conduct resulted in harm to competition and consensus cannot be supported without a showing that disclosure would have resulted in a regulatory outcome superior to the actual Phase 2 RFG

regulations adopted by CARB. Consumer welfare would not be improved by CARB's adoption of different regulations, for example, unless those alternative regulations were equally good or better than the actual Phase 2 RFG regulations in their cost-effectiveness in reducing pollution. If the regulatory alternatives, for example, would have imposed higher costs on California consumers (taking into account both out-of-pocket costs and costs in terms of the value of additional pollution) than the real world outcome, the Complaint's allegations of harm to competition and consumers cannot be sustained. *See* Exhibit 6 (Complaint Counsel's Response and Objections to Respondent's First Set of Interrogatories ("CC First Response")) at 3-4 [REDACTED] Further, the claim that CARB would have avoided consumer harm by limiting Unocal's ability to enforce its patent rights implies that CARB had the ability to arbitrate Unocal's rights under yet unissued patents in the context of its rulemaking and would have done so if the patent application had been disclosed. Thus, a central issue in this case will involve analysis of the actions CARB would have taken if it had been aware of the Unocal patent application, and consideration of the feasibility and effectiveness of alternative regulatory outcomes.

The face of the Complaint contains virtually no discussion or information pertinent to the specific actions that CARB would have taken with knowledge of the Unocal patent application. Unocal's first and second sets of interrogatories therefore sought to clarify Complaint Counsel's theory of the case by requesting specific information regarding alternative regulations that CARB would have enacted and actions that CARB would have taken to restrict Unocal's ability to enforce its intellectual property rights. Unocal also requested that Complaint Counsel specify

what prevented CARB from subsequently enacting the alternative regulations after it became aware of Unocal's patent.[2] *See* Exhibits 2-3 (Unocal's First and Second Sets of Interrogatories).

Complaint Counsel's responses to Unocal's interrogatories identified multiple regulatory scenarios that Complaint Counsel claim CARB would have adopted had Unocal disclosed its patent application. [REDACTED]

Rebuttal of these alternative regulatory scenarios is likely to be an important element of Unocal's defense to this action that will require substantial time and resources to prepare. For each alternative regulatory outcome proposed by Complaint Counsel, Unocal must evaluate the plausibility of the claim that CARB actually would have taken such actions given CARB's decisionmaking process and the information available to CARB at the relevant time, and determine whether the alternative is, in fact, superior to the real world outcome in terms of cost-effectiveness and impact on consumer welfare (taking into account Unocal patent licenses). This assessment will require expert assistance in several areas

[2] Because CARB has the power to amend its own regulations – and has actually done so with respect to the Phase 2 RFG regulations – the only way that the rulemaking could bestow monopoly power on Unocal (assuming that the existence of such power could be shown) is if CARB is for some reason foreclosed from changing its regulations to alleviate any harm to consumers. This regulatory "lock-in" effect is alleged, as it must be, in Paragraph 94 of the Complaint, but no factual support is provided for the claim.

[REDACTED]

In addition, each set of alternative regulations also must be evaluated for its likely impact on emissions, for which the assistance of refining and economic experts is required to evaluate both the emissions impact and the effect of that impact on the regulation's cost-effectiveness and consumer welfare. Unocal's discovery efforts also must be guided in part by its understanding of the theories that Complaint Counsel intends to rely upon to show that CARB would have acted differently with knowledge of the Unocal patent application.

This background provides the context for Unocal's deposition of CARB's Peter D. Venturini from May 13-15, 2003. Mr. Venturini was designated by CARB as its representative on the following three topics:

> "(1) All facts and documents which evidence or reflect that Unocal committed fraud upon the California Air Resources Board and/or the California Air Resources Board's staff before, during or after the adoption of CARB's Phase 2 rulemaking on reformulated gasoline in 1991.
>
> (3) For each fraudulent act identified by you in response to the request in paragraph (1) above, the actions which CARB staff and/or CARB would or would not have taken in 1991, 1992, 1993, [or] 1994 if the act identified by you had not occurred.
>
> (4) The reasons and basis for CARB staff's proposals for and CARB's adoption of Phase 2 Regulations for reformulated gasoline, any amendments thereto including the 1994 Predictive Model and the Phase 3 Regulations for reformulated gasoline, including without limitation the reasons and basis for the T50 specification contained therein."

Exhibit 4 (Notice of Videotaped Depositions of California Air Resources Board and of Peter Venturini and Michael Kenny (Apr. 21, 2003)); *see also* Exhibit 5 (Transcript of Deposition of Peter D. Venturini ("Venturini Tr.") at 9). When asked why he was selected by CARB as its designee for the three topics listed above, Mr. Venturini testified that he was the "unique individual within the Air Resources Board that has the degree of background and experience"

with fuels issues and that "I feel I'm very well qualified to represent the Board in this matter." Venturini Tr. at 10.

Mr. Venturini's testimony at his deposition regarding the actions CARB would have taken if Unocal had disclosed its patent application differed greatly from the multiple alternative regulatory scenarios cited in Complaint Counsel's interrogatory responses. [REDACTED]

In fact, Mr. Venturini testified that the difficulties of assessing the strength of Unocal's patent rights as late as 1999, years after CARB became aware of Unocal's patent rights, were so great that CARB did not consider Unocal patents at all during its Phase 3 RFG rulemaking to adopt new regulations to replace the Phase 2 regulations that are the subject of the Complaint. Venturini Tr. at 403. Instead, Mr. Venturini's principal contention was that CARB would not have adopted any Phase 2 RFG regulations if it had been aware of the Unocal patent application.

A straightforward comparison of Mr. Venturini's deposition testimony on behalf of CARB with Complaint Counsel's interrogatory responses shows that the two are irreconcilable with respect to what CARB would have done had it been aware of the Unocal patent application. Sections II.B and II.C below identify the specific points of contradiction. Because CARB's designated witness has mooted many of the alternative regulatory outcomes included in Complaint Counsel's interrogatory responses, those responses should now be amended and materially inaccurate contentions should be withdrawn. As shown in Section II.D below, the Commission's rules and caselaw squarely impose this obligation. Prompt amendment of the

interrogatory responses will also have the salutary effects of narrowing issues for trial and avoiding unnecessary costs and burdens on Unocal in its preparations for trial.

B. Mr. Venturini's Deposition Testimony Has Rendered Complaint Counsel's Responses to Interrogatories Nos. 1 and 3 Materially Incorrect.

Unocal's interrogatory No. 1 requested that Complaint Counsel "identify with specificity the terms of the alternative regulations that you claim CARB would have adopted" but for Unocal's alleged fraud. Complaint Counsel's response to this interrogatory stated that [REDACTED]

See CC First Response at 3. Complaint Counsel then enumerated the following alternatives as a non-exclusive list of options allegedly available to CARB: [REDACTED]

Id. at 3-4. Complaint Counsel's response further stated that [REDACTED]

Id. at 4.

Unocal's Interrogatory No. 3 asked Complaint Counsel to "identify with specificity the terms of the regulations that CARB would have adopted had Unocal disclosed its pending patent rights prior to the promulgation of CARB's Phase 2 Regulations" and to "describe specifically what has prevented CARB from subsequently adopting" such regulations. Complaint Counsel's response to this interrogatory again asserted that [REDACTED]

See Exhibit 7 (Complaint Counsel's Response and Objections to Respondent's Second Set of Interrogatories ("CC Second Response") at 2). Complaint Counsel then listed six alternative regulatory scenarios, alleged to be a non-exhaustive list of options available to CARB: [REDACTED]

Id. at 3.

[REDACTED]

However, the testimony of CARB's designated 3.33(c) representative, Mr. Peter D. Venturini, is crystal-clear that CARB would not have taken any such actions during its Phase 2 RFG rulemaking even with full knowledge of Unocal's patent application.

At his deposition, Mr. Venturini was asked specifically what CARB would have done if Unocal had disclosed the fact of its patent application. Mr. Venturini's response was "[i]f Unocal had told us there was a pending patent application, I think the outcome would have been no regulation." Venturini Tr. at 503. In follow-up questioning, Mr. Venturini restated this conclusion repeatedly: "[w]e would not have had a Phase 2 regulation in November," *id*. at 504, and "[b]ut I'm telling you if Unocal had told us they had a patent applied for, we would not have taken that regulation to the board. I'm very confident about that." *Id*. at 504-05.[3]

In any event, Mr. Venturini could not have credibly supported to Complaint Counsel's claims regarding CARB's options in the Phase 2 RFG rulemaking given his testimony earlier in his deposition regarding CARB's actual behavior during the subsequent Phase 3 RFG rulemaking. The Phase 3 RFG rulemaking took place in 1999, four years after Unocal's reformulated gasoline patent was issued. By that time, Unocal had prevailed at the district court on infringement claims against several major refiners with regard to its '393 patent. At his deposition, however, Mr. Venturini testified that CARB never considered the Unocal patent as part of the Phase 3 RFG regulations. *Id*. at 402-403. Mr. Venturini testified that CARB did not consider the Unocal patent "because it was still in our view in a state of flux" and "we believed that there were concerns with the validity of the patent." *Id*. at 403. In other words, CARB believed that the uncertainty associated with the scope of Unocal's patent rights was too great for the patent to be meaningfully analyzed in its Phase 3 RFG rulemaking process even after Unocal prevailed in its infringement action at the district court. That uncertainty, of course, would have

[3] Contrary to Complaint Counsel's claim that CARB would have sought to maximize the cost effectiveness of its regulations, Mr. Venturini testified that CARB would not have adopted its Phase 2 regulations regardless of whether the infringement rate under the patent was 1 percent or 99 percent and regardless of the costs of avoiding the patent. Venturini Tr. at 518.

been far greater during the Phase 2 RFG rulemaking in 1991, long before Unocal's patent even issued. At that point, it was not even known whether Unocal would ever receive a patent, let along which of its claims could be allowed. Mr. Venturini could not have credibly asserted that CARB refused to consider the Unocal patent in the Phase 3 RFG rulemaking because of uncertainty, but would have made substantive judgments regarding the patent application eight years earlier in the Phase 2 RFG proceeding.

Indeed, Mr. Venturini went on to confirm that had CARB known about Unocal's patent application during the Phase 2 RFG rulemaking, it would not have made any efforts to avoid the patent application, but would simply have adopted no regulations at all:

> Q: What if Unocal had disclosed the content of the patent application but told you that it had to be held confidential, would CARB have adopted regulations to avoid the patent?
>
> A: We would still not have adopted a regulation. And – and I can tell – tell you why if you'd like.
>
> Q: Sure.
>
> A. One, if we had to keep this confidential, and our – you know, our process is very open, we would be put in a very difficult position because we would have to make our own determination of what did or did not consider infringement on the patent. We couldn't put it out in the public and say here's some specifications we came up with and we tried to design these specifications to avoid the patent, we need your input if we're correct, we could not have done that. And so that – that risk would have been extremely high. So I – once again, I'm very confident in saying we would not have adopted the Phase 2 regulations."

Venturini Tr. at 510-11.

In response to subsequent questioning, Mr. Venturini left no doubt that CARB would not have adopted the Phase 2 regulations under any conceivable disclosure that Unocal could have made. When asked what CARB would have done if Unocal had disclosed its application to CARB and permitted CARB to share the disclosure with other refiners, Mr. Venturini responded

that "[i]f they had disclosed to us there is a patent, there would not have been a regulation." *Id*. at 515. Similarly, even if Unocal had disclosed its application to CARB, allowed CARB to discuss the application with others, and was willing to discuss licensing terms, Mr. Venturini maintained that "I think I answered that already, that if the patent had been disclosed to us, there would not have been a regulation." *Id*. at 519.

Given the foregoing testimony on the part of CARB's designated witness with respect to its likely actions in the event Unocal had disclosed its patent application, Complaint Counsel's responses to Unocal's Interrogatories Nos. 1 and 3 are plainly and materially incorrect. Mr. Venturini specifically disavowed any likelihood that CARB would have altered the terms of its Phase 2 RFG regulations or that CARB would have made any effort to avoid an overlap between its regulations and Unocal's patent applications. Instead, Mr. Venturini consistently responded that "the thing that is certain is if Unocal had informed us in 1991, before we adopted this regulation, that there was a patent pending, there wouldn't have been a regulation." *Id*. at 517-518. The multiple regulatory scenarios that Complaint Counsel ascribed to CARB in its responses to Unocal's interrogatories now have been unequivocally rejected by CARB's own witness. Yet Unocal remains burdened with the substantial work needed to rebut the [REDACTED] presented by Complaint Counsel's interrogatory responses. *See* CC First Response at 4. In light of Mr. Venturini's testimony, Complaint Counsel have a clear duty to act promptly to amend their inaccurate interrogatory responses to conform with the testimony of CARB's designated representative.

C. Mr. Venturini's Deposition Testimony Has Rendered Complaint Counsel's Response to Interrogatory No. 2 Materially Incorrect.

Unocal's Interrogatory No. 2 requested that Complaint Counsel identify with specificity the actions that CARB would have taken, but for Unocal's alleged fraud, that would have

affected Unocal's ability to enforce its patent rights in reformulated gasoline. Complaint Counsel responded to this interrogatory by identifying four possible actions that CARB [REDACTED] Complaint Counsel stated that [REDACTED]

CC First Response at 7-8.

Once again, Mr. Venturini's testimony as CARB's designated representative on this topic under Rule 3.33(c) unequivocally rejected the alternatives proffered by Complaint Counsel in their interrogatory response. Specifically, Mr. Venturini denied that CARB would have assumed any role in facilitating license negotiations among Unocal and other refiners:

> Q: Let me ask you this: If Unocal had disclosed the application to CARB and allowed CARB to disclose the application to others and was willing to discuss potential licenses, what would have happened?
>
> A: I think I answered that already, that if the patent had been disclosed to us, there would not have been a regulation.
>
> Q: Regardless of what Unocal would have licensed it for?
>
> A: Correct.

Venturini Tr. at 519-520.

Similarly, Mr. Venturini testified that CARB would have chosen to adopt no regulation instead of considering any factors relating to possible infringement rates or royalty costs of the patent.

Q: You're saying that you would not approve any regulation that was covered by a patent application, and I'm asking you would it have made a difference to you what the potential infringement rate was?

A: No.

Q: Would it have made a difference to you as to what the actual costs of avoiding the patent were?

A: No.

Id. at 518.

Mr. Venturini thus testified unequivocally that CARB, even if it had been aware of Unocal's patent application, would have taken no action to assess the scope of the application, seek an agreement on royalties, or to facilitate licensing negotiations between Unocal and other refiners. This testimony is again consistent with Mr. Venturini's statements that CARB gave no consideration at all to Unocal's patent even during the Phase 3 reformulated gasoline rulemaking in 1999, four years after CARB admittedly became aware of the patent.

Q: Did you consider the Unocal patent as part of the Phase 3 regulations?

A: No.

Id. at 402-403.

Mr. Venturini's testimony regarding CARB's inability or unwillingness to assess the impact of Unocal's patent in the context of its rulemakings is irreconcilable with the interrogatory response provided by Complaint Counsel. Complaint Counsel fully aware of these deficiencies, having participated in Mr. Venturini's deposition and three separate pre-deposition preparation sessions. Venturini Tr. at 10-12. The Commission's rules require Complaint Counsel provide amended interrogatory responses that are consistent with CARB's sworn representations relating to its actions.

D. The Commission's Rules Impose an Unambiguous Obligation on Complaint Counsel to Amend Their Materially Incorrect Interrogatory Responses.

Rule 3.31(e) of the Commission's Rules of Practice imposes a duty upon parties "to supplement or correct [a] disclosure or response" under certain circumstances, including "a duty seasonably to amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect." Rule 3.31(e)(2). As Your Honor has explained in previous cases, the duty to "seasonably" amend interrogatory responses is not a license to equivocate or delay in the face of incontrovertible evidence that a previous response has become materially inaccurate. In *Hoechst Marion Roussel*, Your Honor ordered Complaint Counsel "to supplement its responses to these interrogatories *as soon as* it has any information inconsistent with, or in addition to, its previous responses . . . ." *See* Exhibit 8 (*In the Matter of Hoechst Marion Roussel, Inc.*, Order on Respondent Andrx's Motion to Compel Complaint Counsel to Respond to Interrogatories (Aug. 18, 2000) (emphasis added)). Similarly, Your Honor further noted in a recent proceeding that Rule 3.31(e) imposes a "continuing duty to supplement [responses] *as soon as* additional information becomes available." *See* Exhibit 9 (*In the Matter of MSC.Software Corp.*, Order on Respondent MSC.Software Corporation's Motion to Compel Responses to Written Discovery (Feb. 21, 2002) (emphasis added)).

Under these circumstances, there is simply no justification for Complaint Counsel's refusal to provide amended responses to their materially incorrect interrogatory responses. Complaint Counsel are plainly aware of the complete dissonance between Mr. Venturini's testimony on the one hand and their interrogatory responses on the other. Complaint Counsel were in attendance throughout Mr. Venturini's deposition and, as noted, participated in three preparation sessions with Mr. Venturini in advance of his deposition. Those facts notwithstanding, Complaint Counsel waited for more than a week to respond to Unocal's letter

requesting an amended response (and then only after receiving a second letter requesting an acknowledgement of the first letter). Amazingly, Complaint Counsel's initial letter purported to deny that any of the previous interrogatory responses were materially incorrect or incomplete and offered only to "review Mr. Venturini's transcript after we receive the final signed and corrected version" and to "seasonably" amend prior responses "[i]f it is appropriate."

Following another week's delay, Complaint Counsel served upon Unocal a one-paragraph addition to its previous interrogatory responses which claimed only to "incorporat[e] by reference" Mr. Venturini's testimony into the previous responses. Of course, this so-called "supplemental response" does not remedy any of the materially incorrect statements in the original response that arise from the contradictions between Mr. Venturini's testimony on behalf of CARB and Complaint Counsel's responses. Complaint Counsel's "supplemental response" does not withdraw any alternative regulatory scenarios that have been disavowed by CARB, nor does it offer any explanation for how the original responses can possibly remain viable in light of Mr. Venturini's deposition testimony. "Incorporating" the 648 pages of Mr. Venturini's testimony into the interrogatory responses is meaningless where that testimony directly contradicts the substance of those same responses. Rather than provide considered and accurate amended interrogatory responses, to which Unocal is plainly entitled, Complaint Counsel have chosen to delay and equivocate. This type of gamesmanship is not contemplated by the Commission's rules and should not be permitted.

Complaint Counsel's dilatory tactics are in direct contravention with the premise of Rule 3.31(e), which, as the Commission explained in adopting the rules, "is intended to promote greater candor and cooperation among parties by placing an affirmative burden on each party to ensure that its original response remains accurate and complete." *See* Federal Trade

Commission; Interim Rules with Request for Comments, 61 Fed. Reg. 50,640, 50,643 (Sept. 26, 1996). Mr. Venturini's testimony has plainly rendered Complaint Counsel's initial interrogatory previous responses materially inaccurate, but Complaint Counsel have refused to provide accurate amended responses "as soon as" the information to do so is available, notwithstanding the Commission's rules and Your Honor's clear guidance on the application of this rule.

Complaint Counsel's unwarranted delaying tactics are highly prejudicial to Unocal. Under this Court's Scheduling Order, Unocal's expert reports in this proceeding are due in a little more than two months. Complaint Counsel's responses to Unocal's interrogatories raised a [REDACTED] (CC First Response at 4), each of which must be analyzed in detail by Unocal's experts in terms of feasibility, cost and emissions impact, among others. By contrast, Mr. Venturini's testimony indicated that CARB's options were in fact much more limited. It is highly burdensome, and completely unnecessary, for Unocal to be forced to continue to expend resources to defend itself against regulatory scenarios that Complaint Counsel have an obligation to withdraw based on their knowledge that Mr. Venturini's testimony has rendered the previous responses materially inaccurate.

Finally, prompt service of amended interrogatory responses will operate to narrow the issues for trial by eliminating regulatory alternatives that have been proved to be implausible by the testimony of CARB's designated representative. At the Pretrial Hearing, Your Honor urged both sides to work together to facilitate the narrowing of issues raised by the Complaint and Complaint Counsel agreed to work toward that goal. Pretrial Hearing Tr. at 11. Unocal submits that, at a minimum, Complaint Counsel must promptly amend of interrogatory responses that are now materially incorrect and withdraw alternative regulatory scenarios that have been directly contradicted by the testimony of the regulatory agency itself.

III. CONCLUSION

In light of the foregoing, Complaint Counsel should be directed immediately to prepare amended responses to Unocal's First and Second Set of Interrogatories. A proposed Order so ruling is attached as Exhibit 10.

Respectfully submitted,

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ATTORNEYS FOR UNION OIL COMPANY OF CALIFORNIA

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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STATEMENT REQUIRED BY SECTION 3.22(f)
OF THE COMMISSION'S RULES OF PRACTICE

Counsel for Respondent Union Oil Company of California ("Unocal") have conferred with Complaint Counsel in a good faith attempt to resolve the issues raised by the attached motion, as evidenced by the following:

1. On May 21, 2003, counsel for Unocal sent a six-page letter to Complaint Counsel requesting that Complaint Counsel's responses to Unocal's interrogatories nos. 1-3 be amended in light of the deposition testimony of Peter D. Venturini, in his role as the person designated by the California Air Resources Board ("CARB") to testify on its behalf regarding the alternative regulatory actions that CARB would have taken absent Unocal's alleged fraud. (*See* Attachment A). The letter explained the specific contradictions between Complaint Counsel's responses and Mr. Venturini's testimony, and requested that amended responses be supplied as promptly as possible.

2. On May 29, 2003, having received no response from Complaint Counsel in response to the letter of May 21, 2003, counsel for Unocal sent a second letter reminding Complaint Counsel of the obligations imposed by the Commission's Rules of Practice and requesting a prompt response. (*See* Attachment B).

3. On May 29, 2003, Complaint Counsel sent a letter to Unocal indicating that the content of Mr. Venturini's deposition would be reviewed "after we receive the final signed and corrected version" and that amended interrogatory responses would be provided "if appropriate." (*See* Attachment C). Complaint Counsel's letter denied that the original interrogatory responses were in any way materially incomplete or inaccurate.

4. Following receipt of Complaint Counsel's letter, counsel for Unocal sent another letter on May 29, 2003, (*see* Attachment D), indicating that Complaint Counsel's intent to wait until a final signed version of Mr. Venturini's transcript was available prior to reviewing the testimony was unacceptable and that Unocal was prepared to move to compel a timely amended response.

5. Complaint Counsel responded to Unocal's letter on May 29, 2003, proposing a telephone conference to meet and confer on the interrogatory responses. (*See* Attachment E).

6. On June 2, 2003, Complaint Counsel J. Robert Robertson and John Roberti met and conferred by telephone with Unocal's counsel Joseph Kattan and Chris Wood. Mr. Robertson indicated that he needed additional time to review the transcript of Mr. Venturini's deposition before determining whether Complaint Counsel would agree to provide amended interrogatory responses. Mr. Robertson agreed to call Unocal's counsel by June 6, 2003, to communicate his decision on amending the interrogatory responses. Also on June 2, 2003, Unocal's counsel sent a letter to Complaint Counsel memorializing the timing agreed upon during the conference call. (*See* Attachment F).

7. On June 6, 2003, Complaint Counsel did not call Unocal's counsel but instead provided a one-paragraph "supplemental response" to their previous interrogatory answers. (*See* Attachment G). This "supplemental response" did not amend or withdraw any of the

materially inaccurate statements included in the prior interrogatory responses, but merely stated that the deposition testimony of Mr. Venturini was "incorporat[ed] by reference" into the prior responses. Throughout the exchanges noted above, Complaint Counsel have never disclosed their substantive reasons, if any, for their continued refusal to amend their interrogatory responses as required by the Commission's Rules of Practice.

Respectfully submitted,

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In the Matter of Union Oil Company of California, a corporation	Docket No. 9305

ORDER REQUIRING COMPLAINT COUNSEL TO AMEND
THEIR INTERROGATORY RESPONSES PURSUANT TO RULE 3.31(e)(2)

Section 3.31(e)(2) of the Commission's Rules of Practice requires each party to "seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect." It is apparent that Complaint Counsel's initial responses to Unocal's First and Second Sets of Interrogatories have been rendered materially incorrect by the deposition testimony of the California Air Resources Board through its designated representative, Mr. Peter D. Venturini, and that Complaint Counsel's "supplemental response" that purports to "incorporat[e] by reference" that testimony has not remedied the material inaccuracies in the responses. Accordingly,

IT IS ORDERED that:

Complaint Counsel shall, within three (3) days of service of this order, provide to respondents' counsel amended responses to Unocal's Interrogatories Nos. 1-3 that correct factual errors in prior responses and respond fully to the interrogatories.

_____

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2003, I caused a copy of the attached Respondent Union Oil Company Of California's Motion To Compel Amended Responses To Interrogatories (Public Version) to be served upon the following persons :

The Honorable D. Michael Chappell (by hand)
Federal Trade Commission
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ORIGINAL SIGNATURE ON FILE WITH COMMISSION
Susan M. Dale